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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

COUNTY OF MONTEREY, et al., Plaintiffs, Cross-Defendants and Respondents, v. WILLIAM B. BURLEIGH, Defendant, Cross-Complainant and Appellant.	H034942 (Monterey County Super. Ct. No. M67206)

Appellant William Burleigh appeals from a judgment declaring his property a public nuisance and issuing a permanent injunction in favor of the County of Monterey, in an action arising from appellant's violation of the conditions of a permit for the development of a caretaker's unit on his property. He also seeks review of a judgment against him on his cross-complaint against the County and several County employees. Appellant raises numerous issues pertaining to the County's action and his cross-action, asserting error in the grant of summary adjudication, the denial of his motion to enjoin enforcement of County zoning ordinances, unfavorable in limine rulings, and the award to him of discovery sanctions against the County. We find no error, however, and therefore must affirm the judgments in favor of the County and the individual cross-defendants.

Background[1]

Appellant obtained a Coastal Development Permit in September 2002 and a building permit on January 29, 2003 to construct a caretaker's unit on his property. On March 4, 2003, however, he received a letter from the Planning and Building Inspection Department (Planning Department or Department), notifying him that during a site visit on February 28 its staff had discovered that an excavation into the hillside had damaged a redwood tree, and loose material had been deposited at the base of several trees and shrubs around the construction site. According to the letter, the excavation constituted a violation of a County zoning ordinance and two permit conditions, which required protection of the redwood tree and proscribed deposits of excavated material under the driplines of any tree or shrub on the property. To abate the violations appellant would have to (1) remove the excavated material and place it away from trees and shrubs with erosion control measures in place; (2) submit a report from a certified biologist regarding the prognosis for the redwood tree; and (3) apply for an amendment to his permit to include all development not included in the plans previously approved.

Appellant believed that the violations were trivial, the result of an innocent mistake, and that they could be remedied by an administrative amendment of his coastal permit. The Planning Department disagreed, however, and referred appellant to the Planning Commission to appeal the Department's restoration requirement. Appellant did appeal to the Planning Commission, which conducted a hearing on October 29, 2003. The Staff Report in preparation for that hearing noted that appellant had complied with

[1] The County contends that none of appellant's contentions is reviewable on appeal because he has failed to produce an adequate record for this court's review. Evidently the County assumes that the asserted deficiency makes it unnecessary to provide its own statement of facts or procedural history. While a recital of the history of the appeal is not required for a respondent's brief by the Rules of Court, it is helpful, particularly when, as here, the respondent maintains that the appellant is making unsupported factual assertions and attempting to "skew the record."

the three requirements the Department had imposed in the March 4 letter. However, in the course of evaluating appellant's application for a permit amendment, staff discovered additional violations with respect to the location of the building and the degree of the hillside slope. Staff had proposed an alternative solution that would obviate restoration of the site and continue the permit amendment process, but they had not received the application materials necessary to effect this alternative. Consequently, the Department proceeded with its effort to enforce the restoration demand.

In its October 29, 2003 decision, the Planning Commission determined that the Planning Department had acted within the authority conferred upon it by the applicable zoning ordinance. It specifically found that the Department had correctly required restoration of the site to its pre-violation state, based on the location of the redwood tree relative to the building site, location of the building relative to property lines, and placement of the building on slopes in excess of 30 percent.

The written decision concluded: "THIS APPLICATION IS APPEALABLE TO THE BOARD OF SUPERVISORS. IF ANYONE WISHES TO APPEAL THIS DECISION, AN APPEAL FORM MUST BE COMPLETED AND SUBMITTED TO THE CLERK OF THE BOARD OF SUPERVISORS ALONG WITH THE APPROPRIATE FILING FEE ON OR BEFORE NOV 17 2003. [¶] THIS APPLICATION IS ALSO APPEALABLE TO THE COASTAL COMMISSION. UPON RECEIPT OF NOTIFICATION OF THE DECISION BY THE BOARD OF SUPERVISORS, THE COMMISSION ESTABLISHES A 10 WORKING DAY APPEAL PERIOD. AN APPEAL FORM MUST BE FILED WITH THE COASTAL COMMISSION." Lastly, the decision noted that "<u>if this is the final administrative decision</u>," it was subject to judicial review under Code of Civil Procedure sections 1094.5 and 1094.6, governing writs of review applicable to final administrative orders. Appellant was warned that any petition for a writ of administrative mandate had to be filed within 90 days of the date the decision was final.

Appellant did not seek review of the Planning Commission's decision either by appeal to the Board of Supervisors or through a writ of administrative mandate in superior court, as he believed that either course of action "would be futile and useless." In appellant's view, the Planning Commission's decision was limited to the issue of restoration and "did not consider [or] mention" constitutional issues involving free speech or due process. Following the decision, the County had imposed numerous additional requirements, which were outside the scope of the decision and which would be costly and time consuming to implement. Appellant was convinced that the County was retaliating against him for publishing an article in the local newspaper highly critical of the County's conduct during the period preceding acquisition of his permit. Appellant believed that an appeal or writ petition would not allow him to "vindicate" his retaliation claims.

Meanwhile, the County filed a complaint in superior court on October 8, 2003, seeking a declaration that appellant had maintained a nuisance on his property, in violation of the conditions of his building permit. The County also requested an injunction requiring appellant to correct the violations or "abate all conditions" creating the nuisance.

According to the complaint, a field inspection on February 28, 2003 had revealed that appellant "had caused damage to a protected redwood tree, had placed excavated soil a[t] the base of several trees, and had illegally cut into the hillside where the unit was to be constructed." By cutting into the hillside on which the unit was to sit, appellant had allegedly created a danger that during the seasonal rains a slide would occur, thus blocking or destroying the road below, which was the only access to the surrounding residential area. Appellant had been given the option of restoring the site to its pre-construction condition or seeking an amendment of his permit.

The County alleged that appellant had nevertheless refused to restore the site, seek amendment of the building permit, or agree to an alternative proposed by the County to

partially restore the site. Appellant had also refused to provide erosion control plans to prevent blocking or destruction of the road below. Appellant maintained that complying with the new conditions would involve costs of $60,000 to $70,000 and a period of two to three years.

Appellant filed a cross-complaint on March 4, 2004, which is not in the appellate record, nor are any subsequent amendments.[2] The court's judgment and an unstamped copy of the second amended cross-complaint, however, indicate that appellant named not only the County but also several individual County employees. Appellant's claims against all of the cross-defendants apparently consisted of violations of his civil rights, under 41 U.S.C. section 1983—specifically, the rights of free speech, equal protection, and due process—and abuse of process. He further alleged improper taxation against the County, in violation of article XIIIA, section 4, of the California Constitution. Among the specific allegations was the assertion that multiple ordinances enacted by the County were "vague and unconstitutional," thus creating "a climate of fear in the community," a chilling effect on free speech, and the ability of County officials to act arbitrarily in violation of citizens' rights to due process and equal protection.

On November 14, 2006, the County and the individual cross-defendants moved for summary judgment, contending that (1) appellant had failed to exhaust his administrative remedies because he did not appeal the Planning Commission's decision to the Board of Supervisors or seek a writ from superior court; (2) appellant had failed to join the Coastal Commission, an indispensable party because it had "mandated" the ordinances at issue; and (3) the County was immune from lawsuits of this nature under Government Code section 818.4.

[2] The augmented record contains a signed, but not filed, copy of a "Second Amended Cross-Complaint," and a motion to file a third amended complaint.

In its March 23, 2007 order the superior court rejected the cross-defendants' argument that the Coastal Commission should have been joined as an indispensable party, and it permitted withdrawal of the immunity argument. The court also found that one of the ordinances challenged in appellant's second amended cross-complaint, section 20.90.020[3] of the County's Coastal Implementation Plan, was unconstitutionally vague. It further ruled, however, that as to the first through fourth causes of action (violation of civil rights and improper taxation), appellant had failed to exhaust his administrative remedies. The court therefore granted summary adjudication in favor of the County and the individual cross-defendants in their official capacities, and it dismissed these causes of action with prejudice.[4]

On April 1, 2008, the court heard arguments on the County's demurrer to appellant's third amended complaint, which is not in the record, but which apparently added two new causes of action.[5] At the hearing on the demurrer appellant attempted to refute the County's assertion of a time bar by arguing that the Planning Department should have "sent" him to the Board of Supervisors; if that decision were against him, he would have had 10 days to go to the Coastal Commission. The Planning Commission, appellant argued, had no jurisdiction, so there was "nothing to exhaust." Appellant noted that after he was told that he had failed to exhaust his administrative remedies, he then

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[3] All section references are to Title 20 of the Monterey County Code, the Coastal Implementation Plan, except as otherwise stated.

[4] What happened to the fifth cause of action, for abuse of process, is not clear, as it is not mentioned in the court's written order. Appellant states (without citation to the record) that the court dismissed it. The clerk's minutes of that hearing, however, indicate that the cross-defendants' motion was withdrawn as to this cause of action.

[5] The augmented clerk's transcript contains only appellant's motion to file the third amended complaint and a copy of the proposed pleading. In that motion appellant sought to add two new claims based on a February 2006 appeal of the April 2003 Planning Commission decision to the Board of Supervisors and a February 2007 appeal to the Coastal Commission.

"was free" to appeal to the Board of Supervisors and then to the Coastal Commission, both of which rejected his appeal. The court sustained the demurrer to both of the new causes of action with leave to amend and proceeded to consider motions to strike and other matters.

A court trial on the County's complaint began on October 6, 2008. The County sought to preclude any evidence challenging the Planning Commission's decision because appellant had failed to appeal it to the Board of Supervisors or the Coastal Commission, or to seek judicial review by writ of administrative mandate. Appellant argued that the requested injunction would be contrary to law because it would preclude acts that occurred after the County filed the action. The County countered that appellant had not abated any of the conditions that were before the Planning Commission, and its decision was therefore final for res judicata purposes. The court granted the motion in limine, noting that the issue of appellant's failure to appeal from the Planning Commission's decision had been discussed six months earlier at the April 1, 2008 hearing. It then considered and granted a motion to amend the County's complaint to allege a violation of section 20.90.050 of the Monterey County Code, which deemed any violation of a condition of a permit to be a public nuisance. Finally, the court heard argument on the County's request for an injunction and granted it.

Returning to the cross-action in February 2009, the court heard and ruled on another motion for summary judgment and summary adjudication by the County on the individual cross-defendants' behalf. On February 24 the court granted judgment on the pleadings with respect to appellant's facial challenge to Monterey County Code section 20.90.020, finding it constitutionally valid. The court again denied summary judgment as to the County employees in their individual capacities and that matter was set for jury trial.

On July 30, 2009, the court heard both parties' motions in limine, none of which is in the appellate record. On August 7, 2009, the parties stipulated to dismissal without

prejudice of his claims against the individual cross-defendants in their individual capacities. Taking this dismissal together with the March 2007 dismissal of them in their official capacities, the court entered judgment for these County employees. On the same day, August 21, 2009, the court entered judgment for the County on its complaint, finding the existing conditions of appellant's property to be a violation of his permit and sections 20.90.040 and 20.90.050. The court declared appellant's property to be a public nuisance "with respect to the development of a caretaker's unit on the property," enjoined him from maintaining that nuisance, and ordered him to abate the offending conditions.

Discussion

1. Summary Adjudication

As noted earlier, the March 23, 2007 summary adjudication ruling was directed at the first through fourth causes of action, which alleged violation of appellant's civil rights and improper taxation. The court agreed with the cross-defendants that appellant had failed to exhaust his administrative remedies. We review this ruling de novo, deciding independently whether cross-defendants, as the moving parties, met their initial burden of affirmatively showing that appellant's claims had no merit. (Code Civ. Proc., § 437c, subd. (f)(1).) More specifically, "[w]e apply a de novo standard of review to the legal question of whether the doctrine of exhaustion of administrative remedies applies in a given case." (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 873.)

Because review of summary judgment or summary adjudication is defined by the issues raised in the pleadings, we first direct our attention to the material allegations of appellant's second amended cross-complaint.[6] The first three were claims of civil rights violations based on 41 U.S.C. section 1983. In the first cause of action appellant alleged

[6] We will assume that the document in the augmented record is an accurate copy of this pleading even though it is not file-stamped.

that cross-defendants had penalized him "in retaliation for and to inhibit his exercise of protected First Amendment activities, and by treating [him] in a matter differently from similarly situated persons." The second cause of action alleged a denial of equal protection, in that cross-defendants had imposed conditions on him that were not imposed on similarly situated persons, pursuant to a county "policy and/or custom under which C[ounty] officers and policymakers ratified said disparate treatment" of him. The third cause of action was a due process allegation based on the stop-work order on his construction project, "without the constitutionally required prior due process notice and without any pre-order hearing." The fourth cause of action asserted a violation of article XIIIA, section 4, through the collection of "excessive service fees" for filing permit applications and for appealing "illegal and/or capricious action by a C[ounty] official."

Appellant has not included the moving party's separate statement of undisputed facts in the record on appeal, so we are unable to ascertain the factual support for the challenged motion. The appellate record also lacks the points and authorities in support of the summary judgment motion[7] and much of the reporter's transcript of the summary judgment hearing.[8] Appellant maintains that the missing documents are unnecessary because the essential facts are undisputed. In his own separate statement, however, he listed 12 "disputed material facts." We will review the summary adjudication ruling based on the record before us and the law applicable to administrative decisions.

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[7] We do have the cross-defendants' written *reply*, which contains (in the very last sentence) the only indication that there was an alternative request for summary adjudication. Summary adjudication should not be granted when only summary judgment has been requested. (See *UDC-Universal Development v. CH2M Hill* (2010) 181 Cal.App.4th 10, 25.)

[8] In his Notice Designating Reporter's Transcript, appellant designated only pages 71-72 and 84-121 of this hearing transcript.

"The exhaustion doctrine precludes review of an intermediate or interlocutory action of an administrative agency. [Citation.] A party must proceed through the full administrative process 'to a final decision on the merits.' [Citation.]" (*California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1489 (*Newhall*).) " 'The rule is . . . not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis*, and binding upon all courts.' " (*Abelleira v. District Court of Appeal, Third Dist.* (1941) 17 Cal.2d 280, 293.)

"The primary purpose of the doctrine 'is to afford administrative tribunals the opportunity to decide in a final way matters within their area of expertise prior to judicial review.' [Citation.] 'The essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review.' [Citations.] The doctrine prevents courts from interfering with the subject matter of another tribunal. [Citation.] [¶] Another basic purpose of the doctrine ' " 'is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief.' [Citation.] Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor 'because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.' [Citation.] It can serve as a preliminary administrative sifting process [citation], unearthing the relevant evidence and providing a record which the court may review. [Citation.]" ' " (*Citizens for Open Government v. City of Lodi, supra*, 144 Cal.App.4th at p. 874; see also *Newhall, supra*, 161 Cal.App.4th at p. 1489 [exhaustion requirement promotes administrative efficiency and judicial economy, allowing agency to develop the necessary factual background, apply its expertise, and exercise its statutory discretion].) Thus, " '[i]f an appeal can be taken to a higher administrative body . . . that appeal must

be pursued and the issues must be presented to the final decisionmaker before they can be presented in court.' " (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 285.)

As appellant points out, the doctrine is subject to exceptions. Exhaustion of administrative remedies is not required, for example, when it appears that the agency is without subject matter jurisdiction, when pursuit of administrative remedies would be futile, or where irreparable harm will result if judicial intervention is withheld until a final administrative decision is rendered. (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1081 (*Coachella*); *Public Employment Relations Bd. v. Superior Court* (1993) 13 Cal.App.4th 1816, 1827.)

Appellant invokes multiple exceptions, arguing essentially that exhaustion was not required because (1) the Planning Commission did not have jurisdiction to hear the issues raised in the cross-complaint; (2) the Planning Commission's decision was quasi-legislative, not quasi-judicial; (3) any administrative success would have been inadequate and "futile"; (4) he still had important causes of action for violations of due process and equal protection; and (5) the exhaustion defense was barred by the doctrine of laches.

a. Jurisdiction of the Planning Commission

Appellant first argues that he did not have to appeal the Planning Commission's decision to the Board of Supervisors because he should not have been presenting issues to the Planning Commission in the first place. According to appellant, the Planning Department made a discretionary decision, not an administrative one, when it ordered him to restore the property. That decision should have been appealed directly to the Board of Supervisors; thus, "[t]he Planning Department sent Appellant to the wrong venue," and "the County should be estopped from asserting the failure to exhaust remedies defense."

Appellant does not elaborate on his assertion of estoppel or explain how the requirements for estoppel are met here. Furthermore, appellant's position is not supported by the ordinances he cites. The Director of Planning and Building Inspection and its subordinates have the authority to enforce the provisions of the County's coastal development plan, and to enlist other County departments in the effort to discharge this duty. In its letter to appellant in April 2003 the Planning Department advised appellant that his coastal permit could not be amended administratively, but must be taken to the Planning Commission. The Department also informed appellant of his right to contest the restoration requirement by appealing to the Planning Commission. This was not incorrect advice. The Planning Commission was authorized to determine that no violation of Title 20 had occurred (§ 20.90.110) and to hear disputes over applications for amendment of permits (§§ 20.70.030, 20.70.105B). Appellant correctly followed the procedures outlined in sections 20.90.110 and 20.88.010-20.88.040 for appealing administrative decisions and interpretations of the zoning ordinances. Section 20.86.010-030 merely states that a person or agency dissatisfied with any discretionary decision of the Planning Department director, Zoning Administrator, or Planning Commission *may* appeal to the Board of Supervisors. No procedural error occurred in bringing the matter first to the Planning Commission for resolution.

Appellant further argues that the Planning Commission "did not have jurisdiction to decide the major issues of Appellant[']s cross-complaint" because there was only one primary right at issue, the injury caused by the order to restore the property. Appellant's claims for damages and challenge to the "fee schedule" were, in his view, "not relevant to the restoration order" and thus could not have been presented at the hearing before the Planning Commission.

Appellant does not suggest what course of action he should have taken, but clearly he did not avail himself of another forum to be heard on these claims. If the Planning

Department was confining its directions and advice to the restoration order, it was incumbent on appellant himself to bring any unrelated issues to the proper forum.

Appellant next contends that the restoration ordinance was inapplicable to him because it accords "too broad of a delegation of power to an official" without "standards or safeguards for guidance." "Because the restoration ordinance was a violation of due process, it fails for vagueness, and the Planning Commission action [*sic*] was without jurisdiction to act." Setting aside the point that this constitutional challenge was rejected by the superior court, it does not resolve the procedural question of why the Planning Commission had no jurisdiction to hear the matter. Moreover, if the restoration ordinance was in fact unconstitutional, then no agency could have legally enforced it, and appellant then could have sought judicial review in a writ proceeding.

A similar result must meet appellant's argument that the Planning Commission had no jurisdiction because section 20.90.130 pertains to *applications* for permits; that is, since he already had a permit, the ordinance did not apply to him: "so the Planning Department could not order the property restored, the Planning Commission did not have jurisdiction, and any action taken was void at the outset, and there was nothing for Appellant to appeal, or exhaust." In other words, no restoration could be ordered once a permit is obtained, even when, as here, a violation plainly appears upon inspection of the work in progress. It is not evident that appellant raised this argument to the Planning Department or the Planning Commission, and he offers no reason why they could not have heard his objection. In any event, appellant's coastal development permit did not make him immune to remedial action upon a violation of the permit conditions; the permit could be revoked, modified, or amended. (§ 20.70.010 et seq.) Chapter 20.88 (§§ 20.88.010-20.88.060) governing appeals by any "person aggrieved" by an administrative decision or interpretation of any part of Title 20, broadly encompasses challenges of the nature now asserted. Thus, there is no reason appellant could not legally have brought this challenge to the Planning Commission for an initial decision.

b. Quasi-legislative Action

Appellant next contends that he "did not have to appeal the Planning Commission decision" because it was "quasi-legislative and not quasi-judicial, and did not require further exhaustion of remedies by appeal." In support of this position, appellant (with an incorrect citation) relies on *Langsam v. Sausalito* (1987) 190 Cal.App.3d 871, where the appellate court found a city council's construction of a parking ordinance to be quasi-legislative rather than quasi-judicial, because its action "sought to effectively amend an existing law through the guise of an adjudicatory process." (*Id*. at p. 882.) The court there noted that the council was concerned with the interests of its constituents, and its discussion of the issue was colored by political overtones. (See also *Anaheim Redevelopment Agency v. Dusek* (1987) 193 Cal.App.3d 249, 260 [redevelopment agency's decision to condemn property for redevelopment was a fundamental political question and therefore a quasi-legislative act.])

This case, however, bears no resemblance to *Langsam*. The Planning Commission did not construe any ordinance so as to amend it; indeed, any such amendment would have been beyond its authority. Its decision was not directed at establishing a policy for the surrounding community but was confined to appellant's property and the remediation of violations under *existing* ordinances. As such, it was quasi-adjudicatory and subject to the doctrine of exhaustion of administrative remedies. As appellant did not pursue the entire course of administrative appeals, his action in superior court was foreclosed.

c. Futility

Appellant further complains that an appeal to the Board of Supervisors would have been futile because any success before that body would have resulted only in a reversal of the restoration order, leaving a costly and time-consuming process of obtaining a new permit. The futility exception, however, "is very narrow and will not apply unless the petitioner can positively state that the administrative agency has declared what its ruling will be in a particular case." (*Bollengier v. Doctors Medical Center* (1990) 222

Cal.App.3d 1115, 1126.) Indeed, for this exception to apply "it is not sufficient that a party can show what the agency's ruling would be on a particular *issue or defense*. Rather, the party must show what the agency's ruling would be ' "on a particular case." ' " (*Coachella, supra,* 35 Cal.4th at p. 1081; *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1313.) Appellant has not demonstrated that he would have achieved only a partial success. But even if we agreed with appellant that it would have been futile to seek review by the Board of Supervisors, he does not show why he could not have sought recourse by a writ of mandate. "[The] requirement of exhaustion of judicial remedies is to be distinguished from the requirement of exhaustion of administrative remedies. [Citation.] Exhaustion of *administrative* remedies is 'a jurisdictional prerequisite to resort to the courts.' [Citation.] Exhaustion of *judicial* remedies, on the other hand, is necessary to avoid giving binding 'effect to the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive *judicial* remedy for reviewing administrative action.' (*Briggs v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637, 646 . . . .)" (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70.)

d. Constitutional Claims

In an argument similar to his jurisdictional claim, appellant asserts that he "did not have to appeal the Planning Commission decision [because] the action of the Planning Commission was a violation of due process." The premise of this argument is that the ordinance providing for restoration orders was unconstitutionally vague, and that he was "singled out for punishment" by the Planning Department in retaliation for his article criticizing the Department in the local newspaper. Along the same lines he repeats the excuse that this retaliatory act was a violation of his rights to free speech and equal protection.

But appellant still does not explain why he could not have asserted these claims in the administrative proceeding or alternatively why he failed to seek a judicial remedy by

writ of mandate. "Even where an ordinance is challenged on the ground that it is void as applied to a particular property, the challenger generally must first exhaust all available administrative remedies before asserting his claim in court." (*McAllister v. County of Monterey*, *supra*, 147 Cal.App.4th at p. 285; see also *U.S. v. Superior Court* (1941) 19 Cal.2d 189, 195 ["even where the statute sought to be applied and enforced by the administrative agency is challenged upon constitutional grounds, completion of the administrative remedy has been held to be a prerequisite to equitable relief"].) The exception for procedural due process issues is inapplicable " '[i]f the [administrative remedy] provides for reasonable notice and a reasonable opportunity to be heard.' " (*Bockover v. Perko* (1994) 28 Cal.App.4th 479, 486.)

Appellant's reliance on *Carpintería Valley Farms v. County of Santa Barbara* (9th Cir. 2003) 344 F.3d 822 does not answer this question or help him in any way. There the landowner was permitted to assert constitutional violations (procedural due process, First Amendment, and equal protection) resulting from retaliation by the defendant county with respect to events that were not time-barred. Those *timely filed* claims were not "as applied" takings claims and thus were ripe for judicial review even without further action by the county. (*Id*. at pp. 829-830.)

Here there is no basis for concluding that appellant could not have brought all of his claims to the attention of the Planning Commission -- and failing that effort, to the Board of Supervisors or Coastal Commission, as he was invited to do in the Planning Commission's decision. The second amended cross-complaint focused not on any *facial* invalidity of the county ordinances but on the violation of appellant's civil and constitutional rights in the *application* of the ordinances to his property. These matters could have been brought before the Board of Supervisors or the Coastal Commission had appellant pursued his administrative appeal rights.

e. Laches

Appellant further maintains that "the County's affirmative defense of failure to exhaust administrative remedies, and the grant of summary adjudication, and [*sic*] are barred by the doctrine of laches as a result of a two plus years delay in filing the Motion for Summary Judgment."[9] We disagree.

Laches, when asserted as a *defense*, "requires unreasonable delay plus either acquiescence in the act about which plaintiff complains [fn. omitted] or prejudice to the defendant resulting from the delay." (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 359.) A trial court has wide discretion in deciding whether laches applies in a given case. "Prejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his burdens of proof and the production of evidence on the issue. . . . Generally speaking, the existence of laches is a question of fact to be determined by the trial court in light of all of the applicable circumstances, and in the absence of manifest injustice or a lack of substantial support in the evidence its determination will be sustained." (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624; *Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 Cal.App.4th 502, 519-520 [appellate court will not interfere with trial court's decision on laches question unless it is "obvious a manifest injustice has occurred or the decision lacks substantial support in the evidence"].)

Appellant contends that he was prejudiced by the delay between his cross-complaint and the filing of the summary judgment motion, during which time the County filed an anti-SLAPP motion and he expended "tens of thousands of dollars" in attorney

[9] Appellant filed his cross-complaint March 4, 2004. The County and individual defendants filed their summary judgment motion two and one half years later, on November 14, 2006.

fees.[10] He further contends that the County acquiesced in the cross-complaint by engaging in discovery, meet-and-confer and case management conferences, and numerous other acts during the litigation. Accordingly, the County "should be estopped to assert the exhaustion of remedies defense because of the numerous acts of acquiescence, which alone can defeat the exhaustion defense, even if no prejudice is shown."

Appellant's assertion of laches (which he appears to assume is interchangeable with estoppel) cannot succeed. First, appellant does not show how the protracted course of the *litigation* excused his failure to raise issues *before* the dispute reached superior court. Second, he reargues the position he took in opposition to the summary judgment motion without making any attempt to demonstrate abuse of discretion or other error in the superior court's implied rejection of his laches theory. Furthermore, appellant cites no authority precluding a summary judgment motion merely because more than two years had elapsed since the filing of his cross-complaint while other motions were heard.

f. Excessive Fees

Appellant's fourth cause of action alleged that the County had been violating article XIIIA, section 4, of the California Constitution by collecting "excessive service fees for purposes of revenue, unrelated to the cost of providing the services and unrelated to the benefits derived by the applicant."[11] From the general allegations of the pleading it

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[10] Appellant refers to an anti-SLAPP motion which he represented by declaration to have been unsuccessfully brought by the County in June 2004, three months after he filed his cross-complaint. In that motion, appellant represented, the County had asserted the bar of exhaustion of administrative remedies. Appellant's assertion of prejudice from the expenditure of attorney fees is based on a representation by appellant at the summary judgment hearing; the court accepted the representation that he had paid these fees, though it found no relevance to the fact.

[11] This provision states: "Cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad

appears that the focus of the excessiveness challenge is the filing fee of $10,840 or the "appeal process" fee of "almost $5,000." He also mentioned $40,000 to $60,000 in "fees" which he estimated he would have to pay to contractors and a geologist to start the construction process "all over again." In his February 2007 notice of appeal to the Board of Supervisors, he sought a finding that $8,433 was an unconstitutional amount in filing fees imposed by the Planning Department.

The trial court's summary adjudication order expressly disposed of the fourth cause of action through the finding that appellant should have exhausted his administrative remedies on this claim. Appellant contends that the County "did not specifically challenge this cause of action, and as a result it was never researched, briefed, or argued." Consequently, appellant believes, he "should not be required to respond to this new attack with so little time to research and write. This issue should be sent back to the trial court for discovery and appropriate noticed motions."

We cannot grant appellant the relief he seeks. Appellant did not designate the County's points and authorities in the appellate record, so we have no way to evaluate his claim that the County did not challenge the fourth cause of action in its summary judgment motion. What we do have is the notice of motion, the County's written reply to appellant's opposition, and the designated portions of the reporter's transcript of the hearing. The court's ruling indicates that it agreed with the County that the fourth cause of action was among those subject to the exhaustion rule.

Appellant repeats his prior arguments disputing the applicability of the exhaustion requirement, noting in this context that the passage of "the ordinance establishing the service fees" was a legislative act. He does not identify which fee ordinance was unconstitutional, however, nor does he explain why he could not have raised this

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valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district."

argument to the Planning Commission or appealed on this ground to the Board of Supervisors. (Cf. *Steinhart v. County of Los Angeles, supra,* 47 Cal.4th 1298 [exhaustion doctrine applied to taxpayer's failure to seek administrative remedy for unfair property reassessment claim].)

2. Constitutionality of Ordinances

Appellant next challenges the denial of his motion for permanent injunctions against enforcement of several County ordinances on due process grounds. In its summary adjudication order the trial court ruled that appellant should have exhausted his administrative remedies as to his facial challenges to these ordinances.[12] He specifically takes issue with the "red tag" procedure of stopping work on a project without affording prior notice of the violations (§ 20.90.090(G)); the delegation by the Board of Supervisors of authority to shut down a building project or to take other action to enforce Title 20, the Coastal Implementation Plan provisions (§ 20.90.020); the restoration ordinance (§ 20.90.130); the ordinance providing for variances (§ 20.78.020) and the ordinance providing for proposed amendments to any coastal development permit (§ 20.70.105) Appellant has also invoked several "unconstitutional as applied" challenges as to these provisions and others,[13] which were subject to the exhaustion rule and therefore will not be addressed on appeal.

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[12] As noted earlier, the court denied summary adjudication as to one of the ordinances, section 20.90.020, but later granted judgment on the pleadings, finding no invalidity of this provision. The 2007 summary adjudication order itself is perplexing, since the court had already granted the motion as to the first four causes of action, but then granted it "as to the due process facial challenge" to all but one of the identified ordinances. sections of the. With inapplicable exceptions, summary adjudication is not properly granted on issues or *theories,* but is confined to causes of action. (Code Civ. Proc., § 437c, subd. (f)(1).)

[13] Appellant's challenges to sections 20.145.080(A)(b)(4) (when geologic reports are required), 20.06.1030 and 20.56.570 (defining "front setback" and "front wall," respectively), and 16.12.060 (requiring erosion control plans for permits) are directed at County's application of these provisions to his case.

Appellant has not shown error in the denial of the injunctions. Section 20.90.090 contains an express notice provision, followed by an explanation of the ensuing procedures for challenging the stop-work order in section 20.90.100 et seq. With these procedures in place, anyone believing that discriminatory enforcement has occurred has an opportunity to raise those concerns and be heard. Nothing in those ordinances themselves grants County officials uncontrolled discretion to restrict construction through arbitrary means. Thus, both sections 20.90.090 and 20.90.020[14] are facially valid.

As for section 20.90.130, the restoration ordinance, the appellate record contains no admissible evidence to support the assertion that "[t]his is a difficult ordinance for a person of ordinary intelligence to understand." Similarly, we cannot find section 20.78.020 unconstitutionally vague on the unsupported assertion that "variances are notoriously difficult to obtain."[15] The rest of appellant's challenge to this ordinance is specific to his situation and thus was a matter for determination through the administrative appeal process. Section 20.70.105 likewise is not facially vague; it clearly

[14] Section 20.90.020 grants the Planning Department the authority to investigate "all reported or apparent violations" of Title 20. If the Director finds reasonable cause to believe that a violation does exist, he or she may "take such measures as he deems necessary or expedient to enforce and secure compliance with the provisions of this Title, including measures ordering the immediate restoration of a degraded site to pre-violation, natural conditions in a manner that will not further degrade the environment." In its earlier summary adjudication ruling the trial court found unconstitutional vagueness in the words "he deems necessary or expedient." In its February 24, 2009 ruling granting judgment on the pleadings, however, it determined that "as he deems necessary or expedient" was not unconstitutionally vague. Appellant does not renew his vagueness challenge to this provision.

[15] This provision states only that "[m]odifications to the setback, coverage, height, building site area, floor area ratio and development standard regulations of this Title may be considered by a Variance."

applies to amendments of coastal development permits.[16] Appellant's other complaints regarding this provision are "as applied" grievances which should have been determined through the administrative process.

3. Evidentiary Rulings

Appellant next contends that the trial court erred in granting the County's motion in limine precluding testimony at the upcoming trial. "The court's orders on motions in limine are reviewed for abuse of discretion [citation], except where the grant of a motion in limine excludes all the evidence relevant to a particular claim and thereby disposes of an entire cause of action. In that situation, the appellate court should apply the standard applicable to a motion for nonsuit -- whether the evidence presented by the plaintiff was insufficient to permit a jury to find in the plaintiff's favor." (*R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 385.)

In this case, however, we are unable to review appellant's argument, because we lack any record of the motion or the proceedings. Appellant's opposing points and authorities is insufficient alone to convey the legal basis of the motion or its merit or the reasoning of the trial court. We must therefore presume that the court considered the grounds for the motion and its opposition, and properly exercised its discretion to preclude the evidence appellant sought to introduce. "It is the appellant's affirmative duty to show error by an adequate record. [Citation.]" (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.) A judgment or order of the trial court is presumed correct, and a " 'necessary corollary to this rule [is] that a record is inadequate, and appellant defaults, if the appellant predicates error [on only] the part of the record he provides the trial court,

[16] This section is part of chapter 20.70, pertaining to coastal development permits. It provides, in pertinent part, "Proposed amendments to any permit issued *under the provisions of this Chapter* shall be submitted to the Planning And Building Inspection Department in writing and in sufficient detail to adequately assess the nature of the amendment and any potential impacts of the amendment." (Italics added.)

but ignores or does not present to the appellate court portions of the proceedings below [that] may provide grounds upon which the decision of the trial court could be affirmed.' [Citation.]" (*Ibid.; Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) For the same reason, we cannot consider appellant's challenge to the ruling on the County's motions in limine before trial against the individual cross-defendants, which was scheduled for August 24, 2009.

4. Sanctions

On February 15, 2007, appellant moved for sanctions against the County for its refusal to provide certain documents during discovery. In his declaration he stated that he had paid his attorneys $28,460 "in relation to the Production of Documents and County's Motion to Quash." At a hearing on May 14, 2007, the court denied appellant's motion to strike the County's opposition and ruled that appellant was entitled to sanctions of $8,000. The court filed its order on June 25, 2007, expressly finding "no substantial justification for the County's position opposing discovery." The court therefore ordered the County to pay $8,000 for appellant's attorney fees "as a sanction for Counties [*sic*] misuse of the discovery process," along with $1,439.75 for appellant's costs.

Appellant contends that the court abused its discretion by not granting him all of the attorney fees he had requested. Again, however, we are unable to find error, because we lack a sufficient record of the proceedings. We are not reviewing appellant's motion de novo; instead we must determine only whether the lower court's ruling was arbitrary or irrational. "In choosing among its various options for imposing a discovery sanction, a trial court exercises discretion, subject to reversal only for manifest abuse exceeding the bounds of reason." (*Kuhns v. State of California* (1992) 8 Cal.App.4th 982, 988.) Accordingly, "[s]anction orders are 'subject to reversal only for arbitrary, capricious or whimsical action.' " (*Liberty Mut. Fire Ins. Co. v. LcL Adm'rs, Inc.* (2008) 163 Cal.App.4th 1093, 1102.) Appellant has not provided the County's opposition or a reporter's transcript of the hearing on the motion, so it is impossible to determine how the

court arrived at the amount it awarded. "Appellant must affirmatively show error by an adequate record; error is never presumed." (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448; see also *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295 [burden is on party challenging fee award to provide an adequate record on appeal to assess error].) Because the appellate record provides us with an insufficient basis on which to assess the merits of the motion or the court's reasoning in deciding it, we must presume the order was within the bounds of the court's broad discretion in setting the amount of sanctions.

Disposition

The judgment is affirmed.

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ELIA, Acting P. J.

WE CONCUR:

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MIHARA, J.

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McADAMS, J.